IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CELLCO PARTNERSHIP	)	
a Delaware general partnership	)	**Civil Action No. 7:04CV00029**
d/b/a Verizon Wireless	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OPINION**
	)	
THE BOARD OF SUPERVISORS OF	)	**By: Samuel G. Wilson**
ROANOKE COUNTY	)	**United States District Judge**
Defendant.	)	

Plaintiff, Cellco Partnership d/b/a Verizon Wireless ("Verizon"), contends that defendant, the Board of Supervisors of Roanoke County ("Board"), violated the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151-614) ("the Act"), and state law by denying its application for a special-use permit to construct a broadcast tower in Roanoke County. The court finds that the Board's actions are supported by substantial evidence and do not violate the Act, and the court abstains from hearing the state law claim.

I.

Verizon currently has at least six existing cell towers/sites in Roanoke County and provides substantial wireless coverage to the area. Verizon decided to install a new tower to serve as

> a regional hub through which cellular communications can be directed. Right now, the only facility that is able to do that is located in Richmond. … If the facility in Richmond is somehow disabled, [there is] no way for people living in Southwest Virginia right now to have cellular communications … By putting [a] switch center with [a] tower … in Roanoke, [Verizon] will have … a necessary redundancy to provide secured communications in times of emergency and so forth.

Verizon targeted four sites as potential locations and, after a three year internal investigation, rejected three of the sites because of their proximity to an airport and selected 6720 Thirlane Road as

the best potential location.

6720 Thirlane Road is zoned as a general commercial district. Although telecommunication service centers are permitted by right in general commercial districts, Roanoke County Code § 30-54-2(A)(4) and § 30-29-5, broadcast towers require a special-use permit. Roanoke County Code § 30-54-2(B)(4). Roanoke County Code § 30-19-1 provides the standards for issuance of a special use permit: "[t]he proposal as submitted or modified shall conform to the community plan of the county, … The proposal as submitted or modified shall have a minimum adverse impact on the surrounding neighborhood or community. Adverse impact shall be evaluated with consideration to items such as, … traffic congestion, noise, lights, dust, drainage, water quality, air quality, odor, fumes and vibrations."

6720 Thirlane Road, although zoned general commercial district, abuts a large area zoned low density residential, which is "intended to provide the highest degree of protection from potentially incompatible uses" in order to "maintain the health, safety, appearance and overall quality of life of existing and future neighborhoods." Roanoke County Code § 30-41-1. 6720 Thirlane Road is located approximately 500 feet from Northside High School, and the nearest house is approximately 354 feet away.

Before applying for a special use permit, Verizon contacted the Federal Aviation Administration ("FAA") to ensure that the proposed tower would not interfere with flight paths. The FAA approved the location, but required that the tower be lighted with a strobe light. A flashing white strobe light 100 times brighter than an ordinary hundred-watt light bulb would be used during the day, and a red strobe light ten times brighter than a hundred-watt bulb at night.

On October 24, 2003, Verizon applied for a special-use permit to construct the

telecommunications facility at 6720 Thirland Road. In the application, Verizon proposes to erect a 127-foot broadcast tower and a 17,000 square-foot building housing various wireless telephone, microwave and network equipment to be manned by six employees. The proposed broadcast tower would be studded with over twenty different antennae, including directional panels and parabolic dishes, each of which would be four to six feet in diameter. The proposed tower would be visible from miles around.

The application came before the County Planning Commission ("Commission") for a hearing on December 2, 2003. At this hearing, several citizens expressed concerns about the proposed building's visibility, effect on traffic, and effect on real estate values. The Commission voted to recommend to the Board that they approve the application.

The application proceeded to the Board for a hearing on December 16, 2003. Several citizens spoke at this hearing in opposition to the application. Lisa Allagas, a local resident, expressed health concerns, fears that the tower would be a target for terrorism, and more generalized concerns for the viability of the neighborhood. Eric Lewis, another resident, expressed concerns about public health and traffic. Lewis also presented a petition signed by fifty-two local residents expressing opposition to the proposed tower. Finally, Shirley Norris stated that the local residents "are very anxious to have our community preserved and safe . . ."

Two supervisors also expressed opposition to the tower at the hearing. Supervisor Minnix stated: "[t]his tower is about as high as a twelve story building. That is on up a ways, guys, and it is going to have multiple dishes on it. In my mind at least this is going to have an adverse impact on the citizens, maybe not the health issue so much, but if one of these folks wanted to sell their house and a

real estate man started up the hill with somebody in the car, as soon as they see that tower, they are going to say, 'No thank you.'" Supervisor Church also spoke, stating "this Board has a real problem with disrupting established neighborhoods." The Board then unanimously adopted, by written resolution, a measure denying Verizon's special-use permit application. The Board promptly informed Verizon in writing of the rejection.

Verizon filed the present law suit, alleging that the Board's denial violated the Act and state law. The case is now before the court on the parties' cross-motions for summary judgment.

II.

The Act explicitly preserves localities' authority to regulate land-use issues relating to cell towers: "[e]xcept as provided in this paragraph, nothing in this Chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). The Act creates several limitations to the state's powers, however, two of which are relevant to the present case. "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government of instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). Furthermore "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Verizon claims the Board violated these limitations in three ways. First, Verizon contends the denial of the 6720 Thirlane Road broadcast tower application had the effect of denying wireless service to the area. Second, Verizon

contends that the Board failed to satisfy the "in writing" requirement. Third, Verizon contends the Board's actions were not supported by substantial evidence. The court rejects all of Verizon's contentions.

A. Effect of Prohibiting Wireless Service

"To be entitled to relief under a (B)(i)(II) prohibition of services claim, the plaintiff's burden is substantial." USCOC of Va. RSA #3, Inc. v. Montgomery County Bd. of Supervisors, 343 F.3d 262, 268 (4th Cir. 2003). Generally, a plaintiff must show "a blanket ban of wireless facilities." Id. (citing AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 429 (4th Cir. 1998)). Indeed, although theoretically, "the denial of an individual permit could amount to a prohibition of service if the service could only be provided from a particular site, . . . such a scenario 'seems unlikely in the real world.'" Montgomery County, 343 F.3d at 268 (quoting 360 [Degrees] Communs. Co. v. Board of Supervisors, 211 F.3d 79, 86 n.6 (4th Cir. 2000). In the present case, Verizon cannot meet the substantial burden to establish an effective prohibition of wireless services claim.

The Board has previously granted twelve special-use permits for broadcast towers, and Verizon itself operates antennae from six sites within the county. Verizon already provides wireless service to a substantial portion of Roanoke County, and the proposed broadcast tower would not substantially increase Verizon's coverage; rather, the primary purpose of the proposed tower is to duplicate the services Verizon already is offering in the area. Thus, Verizon has completely failed to show how the Board's decision to deny the proposed broadcast tower at 6720 Thirland Road had the effect of denying wireless services to the area, and the court accordingly grants summary judgment to the Board on this claim.

B. In Writing

Verizon argues that the Board did not satisfy the "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii) because it failed to include an explanation for the denial. However, in AT&T Wirelss PCS, Inc. v. City Council of the City of Virginia Beach, 155 F.3d 423 (4th Cir. 1998), when considering whether a decision "'in writing' must include findings of fact and an explanation of the decision," the Fourth Circuit held that "it is clear that Congress knows how to demand findings and explanations and that it refrained from doing so in section (B)(iii)." Id. at 429; see also AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd., 172 F.3d 307, 313 (4th Cir. 1999) (holding that stamping "Denied" on a permit application satisfied the Act's "in writing" requirement). Accordingly, the Board satisfied the "in writing" requirement by adopting a written resolution denying Verizon's special-use permit application and by sending Verizon a rejection letter. Under Fourth Circuit precedent, no further "writing" was necessary, and the court rejects Verizon's argument.

C. Substantial Evidence

Having concluded that the Board's denial of Verizon's application did not have the effect of prohibiting wireless service and that the denial satisfied the "in writing" requirement, the court now turns to the parties' major dispute–is the decision of the Board supported by substantial evidence in the record. The court concludes that it is.

"[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera v. NLRB, 34 U.S. 474, 488 (1951) (citations omitted). "While substantial evidence is more than a scintilla, it is also less than a preponderance. A court is not free to substitute its judgment for the agency's (or in this case

the legislature's); it must uphold a decision that has 'substantial support in the record' as a whole even if it might have decided differently as an original matter." AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach, 155 F.3d 423,430 (4th Cir. 1998) (quoting NLRB v. Grand Canyon Mining Co., 116 F.3d 1039, 1044 (4th Cir. 1997)).

The Fourth Circuit addressed the Act's "substantial evidence" requirement in AT&T Wireless PSC, Inc. v. The Winston-Salem Zoning Board of Adjustment, 172 F.3d 307 (4th Cir. 1999), holding that the decision of the Winston-Salem Zoning Board to deny a special use permit for construction of an antenna tower next to a historical site and surrounded by low density residential property was supported by substantial evidence. The Fourth Circuit stated

> the Zoning Board, in its denial of AT&T's application, considered the tower's visual impact on the surrounding neighborhood and its effect on the historical value of the Hanes House. As to visibility, the record shows that the tower would only be 500 feet away from the nearest residence. The 148-foot tower would be the first of its kind in the area and would rise well above the tree line of 60-85 feet in the neighborhood. Eight neighborhood residents testified that the tower would have negative impact on the aesthetics and overall integrity of the neighborhood. They expressed their legitimate concern that the neighborhood would become less desirable with the tower and that there would be a detrimental impact on the local homeowners. One resident testified that, in his experience as a mortgage banker, the tower would adversely affect the resale value of the homes surrounding it. . . . Here, the Zoning Board was clearly concerned with the effect that such a large transmission tower would have on the surrounding residential neighborhood in terms of its unsightly physical presence and its impact on the desirability of the neighborhood. . . . In reviewing the application the Zoning Board evaluated the character of the neighborhood, the physical specifications and location of the tower, and concluded that the tower was not in harmony with the area. . . . The record evidence regarding the tower's impact on the neighborhood and the protection of the culturally significant Hanes House satisfies [the substantial evidence] burden.

Id. at 315-17; see also City of Virginia Beach, 155 F.3d at 431 (holding that "the repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views–at the

Planning Commission hearing, through petitions, through letters, and at the City Council meeting–amounts to far more that a 'mere scintilla' of evidence to persuade a reasonable mind to oppose the application").

More recently, the Fourth Circuit revisited this issue in Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000). In that case, Petersburg Cellular Partnership submitted an application for a conditional use permit to erect a communications tower on a piece of commercially zoned private property. Id. at 692. At the Board hearing, three county residents expressed opposition because they feared the tower might collapse, be an attractive nuisance to children, or interfere with flight patterns, and one women stated "in passing that the tower would be an 'eye sore.'" Id. The Fourth Circuit reasoned:

> In Virginia Beach and Winston-Salem, we held that the widespread expression of concerns about the change a commercial communications tower would have on the residential character of a neighborhood amounted to substantial evidence. The concerns expressed were objectively reasonable because they were based on known experience about the effects that commercial uses can have on a residential neighborhood. If a legislative body denies a permit based on the reasonably-founded concerns of the community, then undoubtedly there is "substantial evidence" to support the body's decision. If, however, the concerns expressed by a community are objectively unreasonable, such as concerns based upon conjecture or speculation, then they lack probative value and will not amount to substantial evidence. The number of persons expressing concerns, standing alone, does not make evidence substantial, but it might be relevant to the reasonableness of the concern.

Id. at 695. The court found the three primary concerns voiced by the public–attractive nuisance to children, interference with flight paths, and collapse–to be irrational and therefore found that the board's decision was not supported by substantial evidence. Id. at 696. Because the "eye sore" comment was made only in passing, the court did not address the rationality of this concern.

With these precepts in mind, the issue before the court is whether the concerns expressed by the public and supervisors, which include declining real estate values, aesthetics, and the general "fit" of the tower with the surrounding community,[1] are objectively reasonable based upon the record. The court readily concludes that they are.

The record, which includes Verizon's application, the transcript of the Board hearing, the commission's recommendation, and the petition, establishes that the proposed structure would be twelve-stories high, have a bright, flashing strobe light at its top, be within 200 yards of a neighborhood and a high school, and be constructed on property zoned for commercial uses.[2] In light of the proposed tower's proximity to the neighborhood and obtrusive nature, the court finds that the concerns regarding property values, aesthetics, and fit with the surrounding community are objectively reasonable and constitute substantial evidence supporting the Board's decision. Indeed, the proposed tower in the present case is closer to residences than the proposed tower in Winston-Salem Zoning Board of Adjustment, and the Fourth Circuit in that case explicitly stated that the tower's impact on the surrounding neighborhood supported the Board's decision. Furthermore, unlike the concerns in Nottoway County, the concerns regarding the towers aesthetics and fit with the neighborhood were not made "in passing," 205 F.3d at 692. Rather, these concerns were the very reason why some citizens voiced their opposition and two of the supervisors acknowledged those concerns before the Board

---

[1]Some citizens mentioned health concerns in opposing the tower; however, these concerns are precluded by the Act. 47 U.S.C. § 332(c)(7)(B)(iv); City of Virginia Beach, 155 F.3d at 431 n.6.

[2]The record also shows that the broadcast tower would not significantly increase Verizon's coverage area; however, the propriety of the Board considering the benefits the broadcast tower would bestow to the wireless service provider is not yet established, so the court will not consider this factor in its substantial evidence analysis.

voted.[3]

Verizon dismisses these concerns as speculative, but the court finds otherwise. The Fourth Circuit has stated that a Board may deny an application " based on known experience about the effects that commercial uses can have on a residential neighborhood." Bd. of Supervisors of Nottoway County, 205 F.3d at 695. Here, "known experiences" would allow the Board to reasonably conclude that the tower would have an adverse impact on residential property values and would not be aesthetically pleasing. The Board and local residents are not obligated to call, at their expense, experts to opine as to real estate values and aesthetics when the proposed tower's effect is reasonably apparent to non-experts. See City of Virginia Beach, 155 F.3d at 431 ("In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demands that we interpret the Act so as always to thwart average, non-expert citizens . . .").

Verizon also argues that the Board's decision was not supported by substantial evidence because the location of the proposed tower was zoned as a general commercial district and several

---

[3]Various courts have held that a "few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence on which [a county] could base the denials." Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 496 (2nd Cir. 1999); see also ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 97 (1st Cir. 2002). The court finds that the concerns expressed in this case are not "generalized"; rather, the concerns are quite specific regarding the proximity of the tower to residences and schools, the strobe light atop the tower, the numerous dishes upon the tower, and the height of the tower. Furthermore, the reason for preventing generalized aesthetic concerns to serve as substantial evidence is because "courts fear that local governments may be relying on abutters' general aesthetic objections to mask a de facto prohibition of wireless service." Town of Kingston, 303 F.3d at 98. In the present case, those fears are unjustified because, for the reasons stated in Section II.B, there is no de facto prohibition of wireless service.

other businesses had already been built in the area. The court finds, however, that the Board could reasonably conclude that the surrounding businesses are not so numerous and visible as to make the impact of the tower on the neighborhood speculative. The Board did not forfeit its ability to prevent wireless service providers from constructing communications towers in close proximity to the Thirlane Road neighborhood simply by allowing other, less visibly obtrusive businesses to open near the neighborhood.

The court, therefore, concludes that substantial evidence, including the proposed tower's height, proximity to residences, and highly visible nature due to the flashing lights and multiple dishes, supports the Board's decision to deny Verizon's application for a special-use permit.[4]

III.

In addition to arguing that the Board's denial violated the Act, Verizon also claims the Board violated state law by acting arbitrarily, capriciously, and unreasonably in denying their application for the special use permit. The court abstains from hearing this claim. There is no federal interest in adjudicating a wireless service provider's state land use claim either ancillary to a Telecommunications Act claim or pursuant to the court's diversity jurisdiction, and, indeed, important principles of federalism strongly counsel against it. See Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 828-29 (4th Cir. 1995) ("Resolving the routine land use disputes that inevitably and constantly arise among developers,

[4]Having found substantial evidence supports the Board's decision, the court finds it unnecessary to address the Board's Tenth Amendment argument. See Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County, 205 F.3d 688, 697-705 (4th Cir. 2000) (holding by Judge Niemeyer that the Telecommunication Act's application of the substantial evidence standard to local zoning boards violates the Tenth Amendment).

local residents, and municipal officers is simply not the business of federal courts. … Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes.").[5]

IV.

For the reasons stated, the court finds that the Board's denial of Verizon's application to build a 127-foot communications tower did not violate the Telecommunications Act and the court abstains from hearing Verizon's state law claim. The court accordingly grants the Board's motion for summary judgment.

ENTER: This _____ day of July, 2004.

_____
UNITED STATES DISTRICT JUDGE

[5]Even if abstention was inappropriate, the court would find that the "fairly debatable" standard used by Virginia to assess the reasonableness of legislative acts, Board of Supervisors of Fairfax County v. Robertson, 587 S.E. 2d 570, 575 (Va. 2003), is either concurrent with or more deferential than the substantial evidence standard applied under the Telecommunications Act. Consequently, the court's analysis in section II.C. of this opinion forecloses the possibility of relief to Verizon on the state law claim. However, even if the "fairly debatable" standard were less deferential than the substantial evidence standard, the court finds that an objective and reasonable Board could conclude that placing a 127-foot tower with flashing lights on top within 500 feet of a neighborhood would adversely impact real estate values and the community's aesthetics; therefore, the Board's actions are fairly debatable and Verizon's claim fails.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CELLCO PARTNERSHIP	)	
a Delaware general partnership	)	**Civil Action No. 7:04CV00029**
d/b/a Verizon Wireless	)	
Plaintiff,	)	
	)	
v.	)	**FINAL ORDER**
	)	
THE BOARD OF SUPERVISORS OF	)	**By: Samuel G. Wilson**
ROANOKE COUNTY	)	**United States District Judge**
Defendant.	)	

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the defendant Board of Supervisors of Roanoke County's motion for summary judgment is **GRANTED**. This case is **STRICKEN** from the active docket of the court.

ENTER: This _____ day of July, 2004.

_____
UNITED STATES DISTRICT JUDGE